IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 15 OF 2001

Dr. Mrs. Tanuja Bhat,
Assistant Lecturer,
Department of Biochemistry,
Goa Medical College, Bambolim, Goa. ..... Petitioner.

V/s.

1. State of Goa,
through the Secretary (Health),
with office at the Secretariat,
Panaji, Goa.

2. Goa Public Service Commission,
through its Secretary,
with its Office at E.D.C., House,
Dada Vaidya Road, Panaji, Goa.

3. Dr. Mrs. Chitra Dhume,
Lecturer in Biochemistry,
Department of Biochemistry,
Goa Medical College,
Bambolim, Goa. ..... Respondents.

Mr. M.S. Usgaonkar, Sr. Advocate with Mr Sudesh Usgaonkar, Advocate for the petitioner.

Mr. A.N.S. Nadkarni, Advocate General with Mr. H.D. Naik, Addl. Govt. Advocate for respondents No.1 and 2.

Mr. Mahesh Sonak, with Ms. A. Shirodkar, Advocate for respondent No.3.

CORAM: P.V. HARDAS &
N.A. BRITTO, JJ.

DATE : AUGUST 10, 2004.

ORAL JUDGMENT : (Per HARDAS, J.)

By this petition, the petitioner prays for striking down the amendment dated 16.7.1998 to Item No.5 under Schedule III of the 1979 Rules altering the mode of recruitment and essential qualifications and making it retrospective on the ground that it is a malafide exercise of the power and bad in law. The petitioner also prayed for quashing and setting aside the appointment of respondent No.3 to the post of Lecturer and the further appointment of respondent No.3 to the post of Asst. Professor in the Department of Biochemistry as well as the promotion and appointment of respondent No.3 to the post of Asst. Professor. The petitioner has also prayed for issuance of a writ of mandamus directing respondent No.1 to consider the case of the petitioner for appointment to the post of Lecturer in the Department of Biochemistry under the unamended 1979 Rules from the date on which respondent No.3 was appointed.

2. The facts, in brief, as are necessary for the decision of this petition, are stated, thus :

The petitioner was initially appointed as a Demonstrator by an order dated 2/3/1994 in the Department of Biochemistry. The petitioner joined the duty on 17.3.1994. Subsequently, the post of Demonstrator was re-designated to the Assistant Lecturer by an order dated 16.2.1995 and communicated by order dated 13.3.1995. The services of the

petitioner came to be confirmed on 3.6.1998. Respondent No.3 joined the post of Asst. Lecturer in the Department of Biochemistry on 16.12.1996. She had a Post-graduate Degree in Biochemistry when she was appointed. It appears that respondent No.3 had filed a Writ Petition No.256/1994, challenging the appointment of the petitioner to the post Demonstrator, which came to be dismissed by an Order dated 31.8.1994.

3. Somewhere, on 12.6.1997, the post of a Lecturer in Biochemistry fell vacant. The filling up of the post was governed by the 1979 Rules, then prevailing. The said Rules for the appointment of the Lecturer in Biochemistry provided as essential qualifications .. - (i) recognized Medical qualification included in the First of the Second schedule or Part II of the third schedule (other than licentiate qualifications) to the Indian Medical Council Act, 1956. Holders of qualifications included in part II of the Third Schedule should also fulfill the conditions stipulated in Section 13(3) of the Indian Medical Council Act, 1956. (ii) Post-graduate Degree qualification in the specialty concerned or equivalent, (iii) at least three years' teaching experience in concerned specialty as Senior Resident/Registrar/Tutor/Demonstrator in a Medical College/Teaching Institution. Since the post of a Lecturer fell vacant, it was proposed by respondent No.1 to fill up the vacancy by direct recruitment and respondent No.2 issued an advertisement for filing up of the post of Lecturer in Biochemistry, which was published in

English daily Gomantak Times dated 11.7.1997. However, it appears that there was no response to the said advertisement. It also appears that neither the petitioner nor respondent No.3 were qualified as per the qualifications prescribed in the said advertisement. Though the petitioner had three years' teaching experience, she did not possess the Post-graduate Degree qualification. Though respondent No.3 possessed Post-graduate qualification, she did not have three years' teaching experience. The petitioner meanwhile had registered for Post-graduation in Biochemistry and completed her Post-graduation in Biochemistry somewhere in January, 1998. On 13.11.1998, respondent No.2 issued an advertisement in Marathi daily ``Tarun Bharat'' for filling up the vacancy in post of Lecturer in Biochemistry. The qualifications which were prescribed were as earlier. The petitioner applied for the post. However, the petitioner did not receive any call letter for interview from respondent No.2 and she learnt subsequently, according to the petitioner, that the process of direct recruitment had been aborted and no interviews had been held. Meanwhile, on 16.7.1998, respondent No.1 amended Schedule III of the 1979 Rules in respect of the qualifications for the post of Lecturer and the post of Lecturer in Biochemistry in the said Schedule was divided into two posts, namely (5(a) A-Lecturer (Clinical) 5(b) B-Lecturer (Para-Clinical) were to be filled up by direct recruits for which the qualifications prescribed were the same as before, but the post of Lecturer (Pre and Para-Clinical) was to be filled in by promotion, failing which by direct recruitment. The qualifications

prescribed for promotions were an Assistant Lecturer having Post-graduation Degree in the specialty concerned or equivalent with three years teaching experience after having Post-graduate degree. These Rules were to come into effect from 12.6.1997 retrospectively and where published in the Government Gazette dated 20.8.1998. Since the third respondent fulfilled the necessary qualifications, by an Order dated 13.7.2000, respondent No.3 was promoted to the post of Lecturer in Biochemistry. The promotion was made against the vacant post which was revived by the Government Order dated 13.7.2000. After Rule was issued, respondent No.1 by order dated 22/1/2002, created a new post of Lecturer and on 7.8.2002, appointed the petitioner to the said post by promotion. On 19.6.2003, respondent No.3 came to be promoted to the post of Asst. Professor. The petitioner also by an order dated 2.4.2004, came to be promoted to the post of Asst. Professor, on ad hoc basis, with immediate effect. Respondent No.3 also by an order dated 3.4.2004 came to be promoted to the post of Asst. Professor.

4. The petitioner has challenged the amendment to the 1979 Rules regarding recruitment, promotion and the essential qualifications as being brought about with an ulterior motive to suit respondent No.3. It is stated that the amendment is malafide and arbitrary, as it has been ``tailor made'' to suit respondent No.3. It is next urged that by giving retrospective effect to the amendment, the chances of promotion of the petitioner were scuttled. It is also stated in para 25 of the petition that

the process of the 1979 Rules, in fact, commenced even before the post fell vacant as the proposal for amendment was forwarded by respondent No.1 to respondent No.2 on 3.4.1997 and, therefore, the purpose of changing the essential qualifications, was to ensure that respondent No.3 is qualified for the promotion. It is stated that ``malafide intention was obvious'' .

5. Mr. Usgaonkar, learned Senior Counsel appearing on behalf of the petitioner has placed reliance on the Judgment of the Supreme Court in ***T. Sham Bhat vs. Union of India and anr.,*** 1994 Supp. (3) SCC 340 to urge that the Supreme Court had struck down the Amendment Regulations as violative of Articles 14 and 16 which raised the period of experience from 8 to 12 years of continuous service and thus denying the right to those completing 8 years of continuous service to be considered for selection under IAS Selection Regulations which prevailed for 33 years. The Supreme Court found that the Amending Regulation was pulling together a Senior Collector in State Civil Service and a Deputy Tehsildar in State Civil Service and make them a common class State Civil Service Officers and ask the State Government to recommend the cases of either of them for appointment to Indian Administrative Service. The Supreme Court found that classification of officers brought about by Regulation 2 of the IAS Second Amendment Regulations, was ex facie arbitrary, unreasonable and discriminatory and violative of Articles 14 and 16 of the Constitution. The challenges in the present petition are

not similar to the challenges which were made in the authority which is cited above. In the present case, there is no challenge, at least no direct challenge on the ground that the amendment is violative of Articles 14 and 16 of the Constitution and for that there is arbitrariness in the splitting up of the posts of Lecturer into clinical and pre and para-clinical. The only challenge in the present petition is that the amendment is malafide on the ground that it is a tailor-made, to suit the qualifications of respondent No.3.

6. The Government has amended the Rules, operative retrospectively. There is no challenge in the petition that the Government cannot make the rules operate retrospectively. The only challenge is that by making Rules operate retrospectively, chances of promotion of the petitioner have been affected. This challenge again has a bearing on the first challenge of the petitioner that the amendment is malafide, as it has been made to suit respondent No.3 alone. The authorities, therefore, citied by Mr. Usgaonkar, especially the Judgment of the Supreme Court in the case of ***Chairman, Railway Board and ors. vs. C.R. Rangadhamaiah and ors.*** (1997) 6 SCC 623 and ***Union of India and ors. vs. Tushar Ranjan Mohanty and others,*** (1994)5 SCC 450 are, therefore, not attracted to the challenges and the facts in the present petition.

7. It is an admitted fact that after the advertisement was issued,

neither the petitioner or respondent No.3 were qualified. The process of selection, on the basis of the second advertisement, obviously came to be aborted as the process and amendment of the Rules, was being considered. It is no doubt true that a vacancy is required to be filled in as per the Recruitment Rules, prevailing at the time the vacancy arose. However, it cannot be denied that the Government has the power to amend the Recruitment Rules and make the Recruitment Rules operate retrospectively. Unless the Rules are made to operate retrospectively, the amended rules would not be applicable for filling up the vacancy and the Rules as they stood at the time of vacancy arose, would be applicable for filling up vacancy. In the present case, the Rules have been made to operate retrospectively and the only challenge is that the chances of promotion to the petitioner are scuttled. Therefore, in our opinion, the decisions of the Supreme Court in ***Y.V. Rangaiah and ors. vs. J. Sreenivasa Rao and ors,*** (1983) 3 SCC 284 would not apply to the facts and the challenges in the present petition.

8. The learned Advocate General, appearing on behalf of respondents No.1 and 2, has invited our attention to the Judgment of the Supreme Court in ***V.K.Sood vs. Secretary, Civil Aviation and ors,*** 1993 Supp.(3) SCC 9. The Supreme Court in paras 3 and 6, has held as under :

> ``It is not in dispute that these rules have been made by the President exercising the power under proviso to Article 309 of the Constitution. In the exercise of the rule-making power, the President or authorised

> person is entitled to prescribe method of recruitment, qualifications both educations as well as technical for appointment or conditions of service to an office or a post under the State. The rules thus having been made in exercise of the power under proviso to Article 309 of the Constitution, being statutory, cannot be impeached on the ground that the authorities have prescribed tailor made qualifications to suit the stated individuals whose names have been mentioned in the appeal. Suffice to state that it is settled law that no motives can be attributed to the Legislature in making the law."

9. The learned Advocate General has further relied on a Judgment of the Supreme Court in ***K. Jagadeesan vs. Union of India and ors.*** (1990) 2 SCC 228. In this case, the Supreme Court held that by virtue of the amendment, the appellant therein who was a Diploma holder in Engineering and who was eligible under the unamended Rules became ineligible under the amended rule and had adversely affected his chances of promotion or his right to be considered for promotion. The Supreme Court held that merely because it adversely affected his changes of promotion or his right to be considered for promotion, it cannot be held that the amended Rule was unreasonable or bad.

10. The challenge of the petitioner that the amendment is malafide, as it is made to suit respondent No.3, clearly stands negatived by the Judgment of the Supreme Court in ***V.K.Sood vs. Secretary, Civil Aviation and ors, (supra).*** In respect of the second challenge, the petitioner cannot claim any right to be promoted, but can only claim to have right to be considered for promotion. Since we have negatived the

first challenge to the Rules being malafide, we have to examine whether the challenge of malafide survives against the rules being made to operate retrospectively. An authority competent to lay down qualifications for appointment or promotion, is equally competent to change the qualifications. since these are part of service conditions, they can be changed retrospectively. It is not challenged before us that the Government had no power to make rules operate retrospectively. The only challenge is that the rules have malafidely made to operate retrospectively, in order to favour respondent No.3. Merely because the chances of the petitioner for being appointed as a Lecturer came to be adversely affected by retrospective operation of the rules, it cannot be urged that the rules be struck down on the ground of malafides.

11. After giving our anxious consideration to the submissions advanced by the learned Counsel on behalf of the parties, we are of the opinion that the present petition is sans merit and deserves to be dismissed.

12. Accordingly, Rule discharged, with no order as to costs.

P.V. HARDAS, J.

N.A. BRITTO, J.

ssm.